(3)

Supreme Court, U.S.
FILED
SEP 18 1992
OFFICE OF THE CLERK

No. 92-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETT LOVE,

Petitioner,

vs.

JONATHAN KWITNY, ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

MICHAEL KENNEDY
Counsel of Record
Attorney for Petitioner
425 Park Avenue
New York, New York 10022
(212) 935-4500

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PREFATORY REMARK	1
I – CONCERNING SUMMARY JUDGMENT	2
II – CONCERNING INJUNCTIVE RELIEF	5
III – CONCERNING RULE 11	8
CONCLUSION	10

TABLE OF AUTHORITIES

Case	Page
Abend v. MCA, Inc., 863 F.2d 1465 (9th Cir. 1988), *aff'd.*, 495 U.S. 207 (1990)	7
American Metropolitan Enterprises of New York, Inc. v. Warner Brothers Records, Inc., 389 F.2d 903 (2d Cir. 1968)	6
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	5
Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975)	2
Gaeta v. New York News, Inc., 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984)	4
Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)	6
Masson v. New Yorker Magazine, 111 S.Ct. 2419 (1991)	9
New Era Publications International, APS v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989), *reh. en banc den.*, 884 F.2d 659 (2d Cir. 1989), *cert. den.*, 493 U.S. 1094 (1990)	5, 6
Universal City Studios, Inc. v. Sony Corp. of America, 480 F.Supp 429 (C.D. Cal. 1979), *rev'd. on other grounds*, 659 F.2d 963 (9th Cir. 1981), *rev'd. on other grounds*, 464 U.S. 417 (1984)	6
Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. den.*, 434 U.S. 1014 (1978)	6

Case	Page
Walt Disney Company v. Powell, 897 F.2d 565 (D.C. Cir. 1990)	5
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)	6

No. 92-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETT LOVE,

Petitioner,

VS.

JONATHAN KWITNY, ST. MARTIN'S PRESS, INC.,
BOOK-OF-THE-MONTH CLUB, INC.,
BARNES & NOBLE BOOKSTORES, INC.,
B. DALTON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

PREFATORY REMARK

Within the tight confines of this Reply Brief we cannot undertake to deal with every detail of Respondents' Brief, let alone recapitulate the matter in the Petition. Thus we assume full familiarity with the latter, in particular with the meaning of the terms "*firman* incident" and "tank incident" (at 5), and the "participation" and "false reporting" accusations (at 6).

I — CONCERNING SUMMARY JUDGMENT

The *firman* and tank incidents took place three days before and several hours after the coup, respectively. To turn Love's description of these incidents into an endless series of "admissions" of participation and false reporting, respondents stretch the duration of the coup, making it begin on August 15 and run through August 19. This will not wash. All commentators, including Love's affiants, agree that the coup was over at noon on August 19, and for acknowledgment that that was the *only* day of the coup we can cite pp. 163 and 186 of ENDLESS ENEMIES itself. Respondents also find themselves compelled to rely heavily on propositions — *e.g.*, that "dissemination of the decree was critical to the success of the coup", Brief at 15 — that have no basis in fact or the record.

Contrary to respondents' insinuations, Love's affiants, leading experts in journalism and historiography, were fully aware of the facts. They were acquainted with both Love's term paper and Kwitny's glossed version of it, and thus eminently positioned to declare ENDLESS ENEMIES violative of "the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, Petition at 5-6. (Two of the affiants were CIA "insiders" in the coup.) These affiants stated that Love's acts and omissions were completely within the parameters of normal journalistic practice, and that he was justified in viewing the actions of the Embassy as being within the parameters of normal diplomatic practice. (It is not a coup for a head of state to dismiss a head of government.) From the fact that Love knew the Embassy to have an "association" with the royalists, and that it was its "policy" to support them, he could not have inferred that it was actively involved in the coup.

Whether summary judgment was properly granted with respect to the libel counts in this action, on the ground that Love had failed to meet his evidentiary burden with respect to the appropriate standard of fault, is a question concerning the relation between the materials Kwitny had at his disposal at the

time of his writing and what he made of them. Respondents, unable to refute Love's contention that some of Kwitny's acts and omissions exhibited Constitutional malice, and others gross irresponsibility, now attempt to muddy the waters by bringing in materials not available to Kwitny when he wrote. We can deal here only with Love's 1954 letters.

Love has never denied that he got wind of the U. S. Government's involvement in the coup "later in 1953". He heard about it from Robert Doty, his bureau chief, who replaced Love in Teheran a few days after the coup and subsequently encountered a talkative CIA operative. In 1954, this second-hand hearsay was all that Love had to go on. Doty opposed calling it to the attention of the *Times* and ordered Love not to do so. To make an end-run around Doty, Love wrote to the *Times* about "the refusal of both Doty and myself to report the U.S. role in the overthrow of Mossadegh", but this was at a time when, by *Times* standards, Love himself still had nothing of the kind to report.

Love's 1954 letters to the *Times* were released by Love himself, during the pendency of the instant litigation, to Professors William A. Dorman and Mansour Farhang, who were then working on their magisterial study THE U.S. PRESS AND IRAN (University of California Press 1987). After extensive inquiry, they wrote about Love, "[W]e have concluded he did not learn of CIA involvement until some five months after the coup. . . . If anyone from the *Times* knew in August 1953, it most likely was Doty." At 54. (All this is, of course, known to respondents.)

Respondents write, "Love's counsel viciously charged . . . that, in his Libel Opinion, Judge Owen 'invent[ed] facts prejudicial to plaintiff, [and] doctor[ed] the record.' " Brief at 25. But Judge Owen found that Love sent "an unsolicited copy" of his term paper to Allen Dulles. Petition at A-60. This "fact" — surely prejudicial to Love in light of Kwitny's attempts to link him with the CIA — is wholly of Judge Owen's manufacture. Moreover, in his opinion Judge Owen writes:

> [T]he *New York Times* article [of September 26, 1980] quoted Love as saying that "his failure to report on American involvement in the coup . . . was a result of 'misguided patriotism.' "

Ibid. What the elision dots conceal, however, is Love's disclaimer, "once he learned about it later in 1953". Thus Judge Owen turned Love's denial of the "false reporting" allegation into a confession. If this is not doctoring the record, it is difficult to see what would be. Moreover, it is done in the very paragraph in which Judge Owen, invoking *Gaeta*,[1] holds that Kwitny's "reliance" on Love's words cannot be deemed grossly irresponsible. Thus Judge Owen makes it look as if Kwitny had been entitled to rely on a confession, whereas in fact he should have been forewarned by the denial.

This is merely symptomatic of the difficulties that Judge Owen encounters in dismissing the "false reporting" cause of action. Petition at A-61. Consider, for example, his amazing argument, "I note only that the material most at issue here appears to be part of the factual account of *Love's activities, of which he must have been aware once he had engaged in them.*" (Emphasis added.) The question, of course, is not whether Love was aware of his *own* activities, but whether he was aware of those of the U. S. Government personnel engineering the coup! Lastly, Judge Owen dismisses the affidavits of Love's experts, as "opinion, and . . . not conclusive", citing three cases, not one of which says

---

[1] *Gaeta* stands for the proposition that, if a source has previously provided reliable information, it is not grossly irresponsible to rely on it, even though in a given instance it might supply incorrect information. In *Gaeta*, however, defendant was sued for having published what the generally reliable source had said, whereas Kwitny was sued (in libel), not for publishing Love's words, but for adding defamatory glosses to them. At his deposition, Kwitny admitted that, *but for these glosses*, his readers might not experience the "shock and incredulity" he professed to have experienced on reading Love's term paper.

anything about opinion affidavits. (In any event, the affidavits of the non-moving party do not have to be "conclusive" — they need merely raise a triable issue of material fact.)

It is therefore clear that the motion for summary judgment was decided in a manner that does not comport with the jurisprudence of F.R.C.P. 56 and of *Anderson v. Liberty Lobby, Inc.*, to the effect that the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S., at 257. And this jurisprudence is the same for unpopular causes of action as for popular ones.

II — CONCERNING INJUNCTIVE RELIEF

That injunctive relief is discretionary is not in dispute. What is in dispute is only whether the district court abused its discretion. We therefore skip over respondents' redundant argument, Brief at 19-22, to the effect that injunctions are discretionary. And we agree that equitable considerations may militate against the issuance of an injunction — as laches did in *New Era*, Petition at 16. None of this changes the fact that "under ordinary circumstances [as here, where there are no equitable considerations to the contrary] the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use", *ibid.* Relying on Nimmer's "Generally, it would appear to be an abuse of discretion to deny a permanent injunction where [as here] liability has been established and there is a threat of continuing infringement", *Walt Disney Company v. Powell*, 897 F.2d 565 (D.C. Cir. 1990), states the rule unconditionally: "When a copyright plaintiff has established a threat of continuing infringement, he is *entitled* to an injunction." At 567-568.[2]

Love also "satisfies the traditional prerequisites to the grant of injunctive relief", which require that such relief be "essential

---

[2] In their footnote 17, Brief at 21, respondents turn Nimmer-*Disney*'s "threat of continuing infringement" (which obtains here, since infringement has been established) into "continuing threat of infringement".

in order effectually to protect property rights against injuries otherwise irremediable." Brief, at 21-22. For *New Era* itself recites:

> The [district] court fully recognized that, while an injunction is a drastic remedy, *Weinberger v. Romero-Barcelo* * * *, courts will readily find the requisite threat of irreparable injury in copyright cases, *see, e.g., Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 . . . (1978).

873 F.2d, at 595. *Wainwright* plainly states that "irreparable injury . . . can normally be presumed when a copyright is infringed." 558 F.2d, at 94. And contrary to what respondents suggest, Brief at 23, *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F.Supp. 429 (C.D.Cal. 1979), is completely consistent with this holding:

> [C]ourts have acknowledged that . . . "in the ordinary case," irreparable harm is presumed when the copyright holder's "right to the exclusive use of the copyrighted material is invaded." *American Metropolitan Enterprises of New York, Inc. v. Warner Brothers Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968).

At 464.

Irreparable injury, moreover, is not necessarily economic injury, as *Harper & Row*, with its emphasis on an author's right to control the circumstances of first publication, Petition at 16, makes clear. Of course *Harper & Row* "had nothing whatsoever to do with the issue of injunctive relief", Brief at 21, since it dealt with the threshold question whether *The Nation*'s taking was fair use, one already settled — adversely to respondents — in the instant case. *Harper & Row* did rule out compulsory licenses in the case of unpublished copyrighted expression, and that is of the essence here, since the Court of Appeals in effect imposed such a license upon plaintiff.

In any event, the potential damage from continued infringement consists not only in the possible distribution of the nearly 1,000 copies of ENDLESS ENEMIES remaining in Kwitny's hands[3] – which in and of itself, on traditional theories, deserves to be enjoined – but in that the infringing book may be republished. Respondents, without any support in the Record, allege that the publisher-distributor defendants "have no intent to resume sales of *Endless Enemies*", Brief at 22. Significantly, they fail to make any such statement about Kwitny. In this connection, an item (obviously inspired by Kwitny's circle) in the column "Inside New York", on page 13 of *New York Newsday* of April 15, 1992, appears particularly ominous:

> **Free at Last**
>
> Former Wall Street Journal writer **Jonathan Kwitny** . . . and his book are finally free of **Kenneth** [sic] **Love**'s lawsuits. . . . [T]he other day the Second Circuit Court of Appeals . . . upheld the copyright claim – Love gets 2.6 percent of Kwitny's profits on the book. But now at least maybe Kwitny can *have* some profits. . . .

Finally, we dispose of the absurd suggestion that "the public interest plainly mandates that *Endless Enemies* . . . not be enjoined", Brief at 25, and respondents' attempt to compare Kwitny's book to the motion picture REAR WINDOW. To be sure, in *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir. 1988), the court refused to enjoin that film, even though it infringed the copyright in a short story (one, incidentally, that had been *published*), because the "film resulted from the collaborative efforts of many talented individuals other than . . . the author of the underlying story . . . [and] defendants could not possibly separate out

---

[3] The argument that, because more than 20,000 copies of ENDLESS ENEMIES have already been distributed to the public, there is no point in trying to prevent additional distribution could serve to permit any initially successful infringer to bootstrap himself into being permitted to continue infringing forever. It should not be made in, let alone *by*, a Federal court. Brief at 22.

the 'new matter' from the underlying work," at 1479. With respect to ENDLESS ENEMIES, of course, not only is it easy to separate Kwitny's writing from Love's — there already exists an edition from which the purloined material was deleted. Thus Kwitny, if enjoined from further distributing Love's text, would in no way be impeded from marketing what is rightfully his, and no colorable First Amendment concerns would be raised by the issuance of an injunction.

III — CONCERNING RULE 11

In his Rule 11 motion, Love indeed "challenged virtually every paper submitted by defendants in the libel and copyright proceedings", Brief at 25. But then, virtually every such paper violated Rule 11 one or more times. Some of these violations would be apparent only to persons fully familiar with the factual background of the case and the state of the litigation at the time. That is why the Petition focused on violations that can be substantiated, with certainty, from the face of the Record: examples of misrepresentation for which both the original document or testimony and the defense-concocted version is available for inspection. As a result, no fact-finding is required here, and respondents' extensive argument, Brief at 26-27, that appellate tribunals are ill-equipped, hence reluctant, to undertake such efforts, is beside the point. Whether the five numbered examples offered in the Petition at 20-23 constitute violations of Rule 11 is a question of law and can indeed be decided by an appellate court.

Respondents are unable to refute a single one of these examples. As for the first, all they can say is that "Love disingenuously failed to apprise the District Court that four years prior to Love's Rule 11 motion defendants had amended the Statement to correct that *very* error." Brief at 27. Quite apart from the fact that the retraction was not voluntary, but forced by Love's attorney, it is irrelevant to the question whether Rule 11 was violated: a retraction does not cure a violation, which is "complete when the paper is filed." Petition at 21.

Nor can respondents defuse Example No. 2. Nothing that they quote from Love's term paper speaks of attacking Mossadegh's

house. Contrary to the spirit of *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991),[4] respondents attempt to salvage their claim by advancing what they consider a "rational interpretation" of what Love wrote:

> In the midst of an attempt to violently overthrow a sitting government, why else would someone tell insurgent forces to redeploy to the Premier's house . . . if not to "attack"?

Brief, at 28. Respondents have known since at least 1985 that Love's conversation with the tank commander took place not "[i]n the midst of an attempt to violently overthrow a sitting government", but hours after the government had in fact been overthrown.

Respondents apparently thought it best not to deal with Example No. 3 at all. With regard to Example No. 4, their argument takes the strange form that Judge Mukasey's clearly erroneous finding, which could have been induced only by the defense's misrepresentation, validates that very misrepresentation. Brief, at 27. Such circular self-rehabilitation should not be tolerated.

In the attempt, finally, to downplay the seriousness of the defense's tampering, in a post-trial submission, with trial testimony, respondents push the discussion into a footnote, Brief at 28, n. 20, and ask us to believe that we are faced with "an inadvertent proof reader's error". This requires too great a suspension of disbelief. Proofreaders may *overlook* errors, but they do not generally *introduce* them — certainly not, by sheer happenstance, precisely as necessary to transmute testimony that failed to conform to predictions into testimony appearing to conform. (To say that the change — which turned Love from an *eyewitness* to the coup into an *insider* — "did *not* alter in any meaningful way the content of the quoted passage", Brief at 28, n. 20, is of course, a plain insult to the intelligence of the reader.)

---

[4] To be sure, *Masson* dealt with direct quotations, but much of its analysis clearly carries over to indirect quotations as well.

In any event, in the jurisprudence of the revised Rule 11 the "good faith" apology no longer carries.

To those of us who litigate in the Southern District of New York and the Second Circuit Court of Appeals it is a matter of the greatest seriousness that these courts are apparently content to underenforce Rule 11 by tolerating the misrepresentation, and even the outright falsification, of deposition and trial testimony as well as the contents of documents, at least if these acts are committed by a prestigious law firm. The situation reaches the danger point, however, when a litigant, having for six years been the victim of such practices, complains of them to the court, supporting his Rule 11 motion by ample citations showing that similar practices had triggered sanctions in other districts, only to be held to be in violation of Rule himself for having made the motion. This is bound to send the wrong signal to the local bar: misrepresentation of documents and testimony will not be punished, but bringing it to the attention of the court will!

For that reason, Petitioner respectfully suggests that the holdings of the courts below, exonerating the defense of Rule 11 violations and finding plaintiff to have committed one, depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit in the captioned matter.

Respectfully submitted,

MICHAEL KENNEDY
Counsel of Record
Attorney for Petitioner
425 Park Avenue
New York, New York 10022
(212) 935-4500